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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 128

IN RE BARBARA BURRUS, et al.,
Petitioners.

On Writ of Certiorari to the Supreme Court of North Carolina

Brief for the People of the State of California Amicus Curiae in Support of Respondent

THOMAS C. LYNCH
Attorney General of the State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

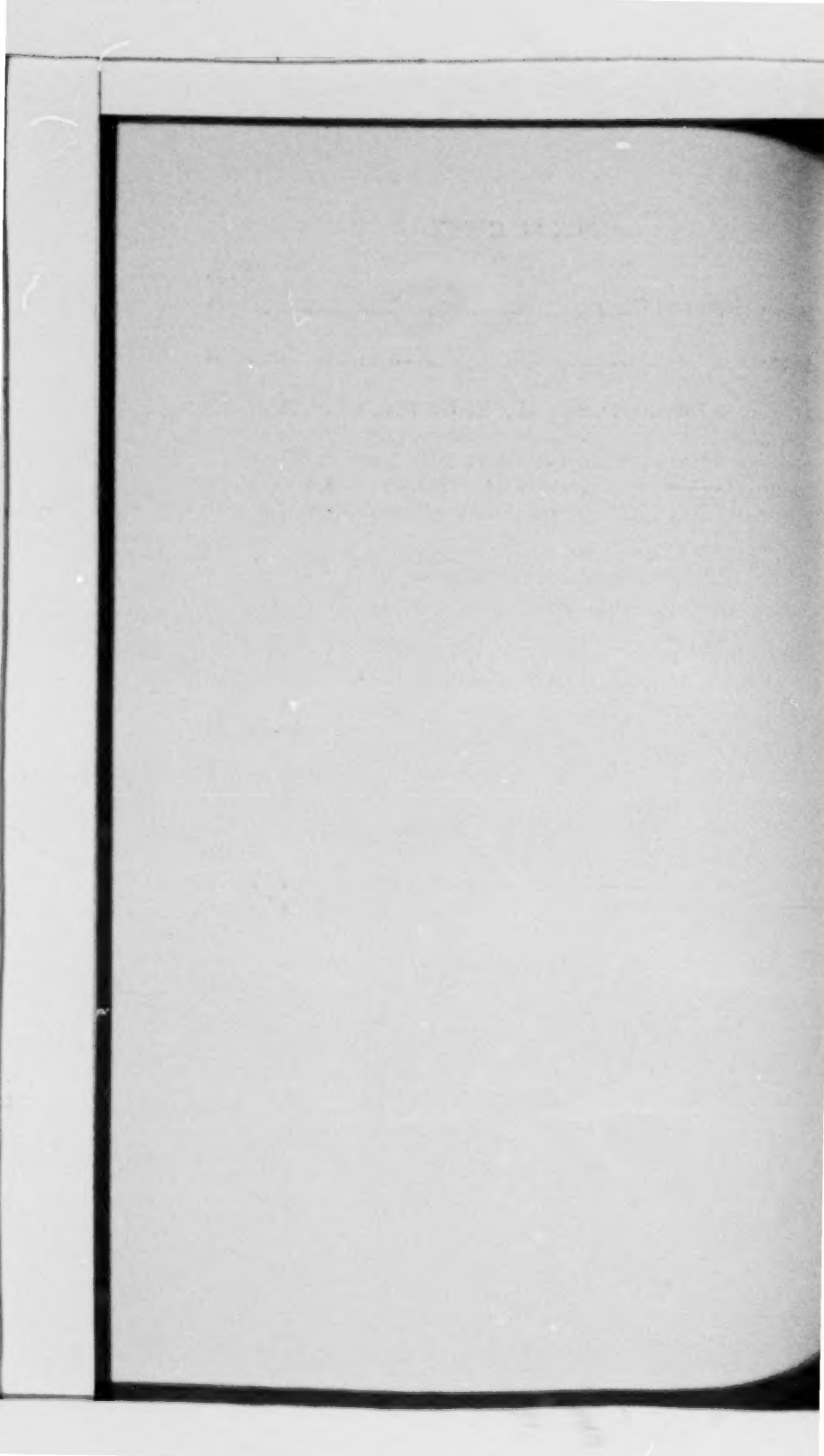
DERALD E. GRANBERG
Deputy Attorney General

GLORIA F. DEHART
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-0799

Attorneys for the People of the State of California

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105



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INTEREST OF AMICUS CURIAE

The People of the State of California have a substantial interest in the question of whether a juvenile is entitled to a jury trial in a juvenile court proceeding to determine the facts upon which jurisdiction of the juvenile court is based. Under the California Juvenile Court Law,[1] there is no provision for a jury trial; the determination of the facts

1. Calif. Welf. & Inst. Code §§ 500-945. See also Welf. & Inst. Code §§ 1000-1258 (Institutions for Delinquents); Welf. & Inst. Code §§ 1700-1861. (The Youth Authority)

which bring a juvenile within the jurisdiction of the court is made by the juvenile court judge.

Under California law, the jurisdiction of the Juvenile Court is exclusive for children under 16 (Calif. Welf. & Inst. Code §§ 604(a), 707); it is initially exclusive for children between 16 and 18, with transfer to the criminal courts in the discretion of the judge pursuant to statutory procedures (Calif. Welf. & Inst. Code §§ 604(a), 707); and it is concurrent for minors between 18 and 21 (Calif. Welf. & Inst. Code §§ 600-602, 604(b)). In the latter case, although the county probation officer or district attorney may have initial discretion in selecting the court, the final determination is the responsibility of the juvenile court judge or the criminal court judge. Calif. Welf. & Inst. Code §§ 604(b), 707.

California Welfare and Institutions Code Section 701 provides that the judge must first conduct a hearing to determine whether the minor (a person under 21) is a neglected, potentially delinquent or delinquent child, as described by sections 600, 601 or 602 of the Welfare and Institutions Code.[2]

If the court makes a finding that the minor comes within its jurisdiction, it then conducts a dispositional hearing (Welf. & Inst. Code §§ 702, 706). The court has various alternatives in treating the minor, some of which are

2. Under section 600, a dependent child of the court is one who is without a parent or guardian to exercise care or control; who is destitute or not provided with the necessaries of life, or whose home is unfit; or who is physically dangerous because of deficiency or disorder. Under section 601, a ward of the court is one who is generally speaking, beyond his parents' control, an habitual truant, or in danger of leading *inter alia*, an immoral life. Under section 602, a ward of the court is one who violates a law, or a court order under section 601.

dependent on the section giving rise to jurisdiction. See Calif. Welf. & Inst. Code §§ 725, 726, 727, 730, 731.

Among the alternatives for minors coming within section 602 and for those within section 601 if further procedures, including a hearing, have been taken, is commitment to the California Youth Authority (Welf. & Inst. Code §§ 730, 731, 777) which has jurisdiction over educational training and treatment institutions maintained as correctional schools. See Welf. and Inst. Code § 1000. The court may also utilize the resources of the Department of Mental Hygiene, the Youth Authority, and public or private agencies or doctors for diagnostic medical, or psychiatric services, treatment or recommendations. See Calif. Welf. & Inst. Code §§ 703, 704, 705, 739, 740, 741. In any case, the commitment or disposition made by the juvenile court may be reviewed and modified at any time. See Welf. & Inst. Code §§ 729, 775-779.

The California Juvenile Court Law establishes a comprehensive and carefully planned system for the rehabilitation, treatment, and when necessary, for the incarceration of minors found to need such care after careful and complete adjudicatory and dispositional hearings. We believe that the provision for hearing by a juvenile court judge rather than a jury fully protects the child's rights to due process in such proceedings.

We appear before this Court as amicus curiae to uphold the validity of such a legislative standard established as part of comprehensive proceedings, which are neither criminal nor civil, but *sui generis,* designed to deal with the problems of juvenile delinquency, potential delinquency and neglect in a rational and humane manner.

ARGUMENT

A Legislative Decision That a Judge Rather Than a Jury Shall Be the Finder of Fact in a Juvenile Proceeding, Whether or Not the Adjudication Is Concerned With Conduct Which Violates the Criminal Law, Does Not Violate the Rights of Juveniles Under the Sixth and Fourteenth Amendments.

Petitioners in this case were brought before a District Court in North Carolina upon petitions alleging each to be a child "in need of the care, protection or discipline of the State" because of acts in violation of the law, and requesting that the court hear and determine the case and if necessary give each child "such oversight and control as will promote the welfare of such child and the best interest of the state." A 2-53. Following hearings at which jury trials were requested and denied, the court made findings of fact which brought petitioners under the jurisdiction of the court. The disposition of each child, after modification on appeal to conform to North Carolina law, was probation, with conditions, for either 12 or 24 months.[3]

Petitioners argue that because they were "subject to incarceration for periods of from six to ten years," the conclusion that they have a constitutionally guaranteed right to jury trial is compelled by the decisions of this Court establishing that juveniles must be afforded due process, *In re Gault,* 387 U.S. 1 (1967), and that adults

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3. Such probation may be modified or revoked during the probationary period at which time the child could be committed or other disposition made. See, *e.g.* A-51; A343-44; N.C. Gen. Stat. §§ 110-29, 110-32 (Brief for Petitioners at 48-52). One of the dispositional alternatives is commitment to the Carolina Board of Juvenile Corrections for assignment to an appropriate facility for an indefinite term not extending beyond the child's eighteenth birthday unless the child is engaged in a vocational training program. Release may be made at any time the Board determines that the child is ready. N.C. Gen. Stat. 7A-286 (4) (Brief for Petitioners at 40-41).

have a right to a jury in trials which may result in a "serious infringement of personal liberty." *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Bloom v. Illinois*, 391 U.S. 194 (1968). Brief for Petitioners at 9. We submit that neither the decisions of this Court nor reasoned analysis compel such a conclusion. The rigid application of adult criminal trial procedure to juvenile proceedings will result not in greater protection of the juvenile but in the destruction of a viable and developing juvenile court system.

A. JUVENILE COURT PROCEEDINGS ARE NEITHER "CRIMINAL" NOR "CIVIL" BUT ARE UNIQUE PROCEEDINGS WHICH REQUIRE PROCEDURES APPROPRIATE TO THE SPECIAL PROBLEMS INVOLVED.

In *Kent v. United States*, 383 U.S. 541 (1966), and *In re Gault, supra*, this Court established the principle that a juvenile, no less than an adult, is entitled to due process in any proceeding which may result in the denial of substantial benefits or in his incarceration for a significant period of time. In *Kent*, interpreting the District of Columbia Juvenile Court Act "in the context of constitutional principles," this Court held that the exercise of the Juvenile Court's discretion to waive its exclusive jurisdiction was so "critically important" to the minor that he "was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision." *Id.* at 577. The reason this waiver of jurisdiction was so critically important was because of the special rights and immunities conferred on the minor by statute:

> "He . . . is shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The Court is admonished by the statute

> to give preference to retaining the child in the custody of his parents 'unless his welfare and the safety and protection of the public cannot be adequately safeguarded without . . . removal.' The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment." *Id.* at 556-57.

Although basing its decision on the benefits conferred, the court in *Kent* expressed some misgivings about the actual performance of Juvenile Courts, and raised doubts as to whether this performance "measured well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties available to adults." *Id.* at 555.

In *Gault*, this Court reached some of the questions raised but not answered in *Kent*, and held generally that procedural due process could not be denied a juvenile merely by classifying juvenile court proceedings as "civil" in nature. This Court went on to hold that certain procedural protections were essential requirements of due process in an adjudication hearing which could result in the incarceration of the juvenile: Notice, right to counsel, right to confront witnesses, and right against compelled self-incrimination.

The doubt expressed in *Kent* as to the performance of the juvenile court system was expressed in stronger terms in *Gault*. Where the emphasis in *Kent* was on the benefits of the juvenile court system which were taken from the child without "due process," the emphasis in *Gault* appeared to shift to the deficiencies of the juvenile court system. "The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were

discarded in Gerald's case." *Id.* at 29.[4] Even so, this Court reiterated the view put forth in *Kent, supra* at 562, that all the requirements of a criminal trial are not included in the due process required for juvenile proceedings:

> "'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.'" *In re Gault, supra* at 30.

Subsequent to *Gault*, this Court again considered the content of constitutional "due process" in juvenile court proceedings. *In re Winship*, 397 U.S. 358 (1970). In *Winship*, this Court held first that in a criminal trial due process required that guilt be established by proof beyond a reasonable doubt, then determined that juveniles were constitutionally entitled to the same proof standard in juvenile court proceedings when charged with violation of a criminal law. "The same considerations which demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child." *Id.* at 365. This Court noted that affording juveniles the protection of proof beyond a reasonable doubt would not risk destruction of

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4. The apparent shift in emphasis may perhaps be explained by the fact that Gerald Gault was "incarcerated" in a state "industrial school" for the remaining five years of his minority, while the adult criminal would have been fined up to $50 or imprisoned in jail for up to two months. Morris Kent, on the other hand, was sentenced in regular criminal proceedings (with the full panoply of due process protection) to from 30 to 90 years in prison. Had he been treated as a juvenile, his "incarceration" would have terminated at majority, again a period of five years. For a perceptive discussion of the basically inconsistent approach of these cases, see Welch, *Kent v. United States* and *In re Gault: Two Decisions in Search of a Theory*, 19 Hastings L.J. 29 (1967).

beneficial aspects of the juvenile process, including the "informality, flexibility, or speed of the hearing at which the fact-finding takes place." *Id.* at 366. This Court found, in summation, "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*—notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination." *Id.* at 368.

Thus, in *Winship* as in *Gault*, this Court held not that all criminal procedure is applicable to juvenile court proceedings but rather that due process requires a fair adjudication procedure and that this requirement cannot be evaded by a "civil" label. We are fully in accord with this flexible approach; even the basic non-criminal character of juvenile proceedings does not justify arbitrariness or a denial of fundamental fairness. At the same time, it makes little sense to turn this Court's rejection of the "civil" classification into a mandate to impose a criminal label, and thus procedure, on proceedings which remain different in function, essentially non-criminal in concept and approach, and which are designed to deal with individuals who have problems, potential, and a commitment from society significantly different from adults.[5]

Juvenile proceedings are a unique response to a problem which is exceedingly complex and, while related in some aspects to the problems of the criminal law, covers areas of concern solely related to juveniles such as neglect, tru-

5. The history and philosophy of the Juvenile Court system were reviewed in *Gault* and *Kent*. See also, The President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report:* Juvenile Delinquency and Youth Crime 2-7 (1967).

ancy, and incorrigibility. It has been pointed out that the question of the state's concern for and jurisdiction over children must be answered not by the criminal law, but by a due process theory that takes account of the qualitative differences of juvenile law from both criminal and civil proceedings.

"It is submitted that the Court's decision in *Gault* has left latitude for making such a distinctive constitutional determination in a 'truly noncriminal' context." Welch, *op. cit. supra*, note 4, at 38.

"If criminal law procedure importation were to proceed apace from the *Gault* decision in total disregard of any constitutional effect for the special rights and immunities of juvenile law, as Justice Harlan predicts, it seems inevitable that 'rigid procedural requirements may inadvertently . . . [serve] to discourage . . . efforts to find more satisfactory solutions for the problems of juvenile crime . . . and development of the systems of juvenile courts.[6] Were the Supreme Court to adopt standards for the measurement of juvenile court due process which make qualitative differences in the effects of a delinquency determination and special treatment essential ingredients, it would ensure a potent incentive for a more physically and functionally valid juvenile law system. As it is. the pressure to be very different from the criminal system is lessened proportionately to the degree of 'essential' procedural identity between the two systems." *Id.* at 39.

California, like North Carolina, has established a statutory system for dealing with the problems posed by juvenile crime, potential crime, various unique juvenile problems and neglect or need. The non-criminal nature of juvenile court proceedings is unequivocally stated in section 503 of the California Welfare and Institutions Code:

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6. Footnote omitted; quotation from *In re Gault* at 77.

> "An order adjudging a minor to be a ward of juvenile court shall not be deemed a conviction of crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."

The California courts have consistently reiterated the view that juvenile proceedings are not criminal in nature but are proceedings in which the state seeks to relieve the minor of criminal responsibility and give him direction and rehabilitation. *See, e.g., People v. Dotson,* 46 Cal.2d 891, 895, 299 P.2d 875 (1956); *In re Castro,* 243 Cal.App.2d 402, 406-07, 52 Cal. Rptr. 469 (1966).

Under the California Juvenile Court Law, the court has a wide range of dispositional alternatives to serve these goals whether the child is neglected (§ 600), potentially delinquent (§ 601) or has committed acts which are crimes (§ 602). If the minor comes within section 602 of the Welfare and Institutions Code or if he is within section 601 and further proceedings have been undertaken, one of the alternatives available to the court is commitment to the California Youth Authority. See Welf. & Inst. Code §§ 730, 731, 777.[7] The California Youth Authority is an administrative agency with jurisdiction over educational training and treatment institutions maintained as correctional schools.

> "The Authority shall have charge of the persons committed or confined in each such institution, and shall provide for their care, supervision, education, training, employment, discipline, and government. It shall exercise its powers toward the correction of their

7. In 1958, Youth Authority commitments on initial petitions were made in 2.2% of Juvenile Court cases. Report of the Governor's Commission on Juvenile Justice, Part 2, at 19. We are informed by the Bureau of Criminal Statistics that similar commitments were made in about 1.3% of the cases in 1967, the most recent year for which such statistics are presently available.

faults, the development of their character, and the promotion of their welfare." Calif. Welf. & Inst. Code § 1004.

Commitment to the Youth Authority does not necessarily mean "incarceration" until majority. The Youth Authority may parole the minors under its charge, and may grant "honorable discharge" or leave of absence. Calif. Welf. & Inst. Code §§ 1176-79. Where a minor proves to be so incorrigible or so incapable of rehabilitation as to render his retention detrimental, the minor may be returned to court, where if over 16, he may be certified to the adult criminal court for criminal trial with all constitutional protections. Calif. Welf. & Inst. Code §§ 780, 707. While commitment is a dispositional alternative, the court has available all those dispositions available for both neglected or potentially delinquent children, including probation with or without wardship, placement with an individual or agency for custody and care, or placement in a juvenile home, ranch or camp. Calif. Welf. & Inst. Code §§ 725-30. The court also may order medical diagnostic or psychiatric services utilizing both public and private facilities. Calif. Welf. & Inst. Code §§ 703, 704, 705, 739-41.

Finally, the court may review and modify the commitment or disposition at any time. Calif. Welf. & Inst. Code §§ 729, 775-79. It should be noted that commitment to a juvenile home or to the Youth Authority for placement in a correctional school is not limited to cases where a "crime" is charged as the basis for juvenile court jurisdiction, nor is commitment to the Youth Authority required even if jurisdiction is based on an act which would be a felony if committed by an adult. The disposition of the child is based on a full review of his background and problems including the specific behavior on which jurisdiction is based.

Disposition is not designed to punish the child for this behavior; the proceedings of the juvenile court are essentially remedial. *In re Dennis M.*, 70 Cal.2d 444, 456-57, 75 Cal.Rptr. 1, 8, 450 P.2d 296, 303 (1969).

As pointed out by the Supreme Court of California, juvenile proceedings so characterized have some apparent similarities to proceedings for the involuntary commitment of mentally ill persons and narcotics addicts. *In re Dennis M., supra,* 70 Cal.2d at 457, n 11. This Court, while demanding that due process be accorded as a constitutional requirement in such special proceedings, has not required all the procedures of a criminal trial even though loss of liberty is not just a possibility but an inevitable result. See *Specht v. Patterson,* 386 U.S. 605 (1967); *Minnesota v. Probate Court,* 309 U.S. 270 (1940). Compare *In re Raner,* 59 Cal.2d 635, 381 P.2d 638, 30 Cal.Rptr. 814 (1963). Similarly, the rationale of special juvenile proceedings is that the juvenile is to be trained and rehabilitated, not punished. His behavior is a product of his immaturity, and his delinquency may be caused or aggravated by factors over which he has little or no control. In short, he is not being punished for his conduct; his conduct is symptomatic of a problem of growth and development which may be amenable to treatment, even where he must be incarcerated for the protection of himself or of society.

> "It is well settled that the Court must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted. Legislatures are, as this Court has often acknowledged, the 'main guardian' of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as 'well-nigh' conclusive. *Berman v. Parker,* 348 U.S. 26, 32 [1964]." *In re Gault, supra,* at 70 (Harlan, J., concurring and dissenting).

The fundamental issue is, of course, to what extent this deference is given where constitutional issues of procedural protection are involved. While the basic non-criminal character of juvenile proceedings does not justify arbitrariness or a denial of fundamental fairness, we urge that it does justify judicial deference to legislative judgment which establishes the procedure at issue here as part of a detailed statutory scheme enacted specifically to provide fundamental fairness in proceedings undertaken in the child's best interests.

B. TRIAL BY JURY IS NOT CONSTITUTIONALLY REQUIRED AS ESSENTIAL TO DUE PROCESS IN A JUVENILE CASE.

The California Juvenile Court Law was extensively revised in 1961 as a result of recommendations made by the Governor's Special Study Commission on Juvenile Justice in the course of a study of all phases of juvenile justice in California. The recommendations made were the "product of an extensive conscientious process of review and reevaluation in which numerous local juvenile and judicial officials throughout the state actively participated." Report of the Governor's Special Commission on Juvenile Justice, Part I, at 10. The procedural scheme recommended by the commission and accepted by the legislature did not provide for jury trial. Despite significant changes subsequent to *Gault*, this particular procedural requirement has remained unchanged.[8] We submit that reasoned analysis supports the legislative judgment.

In its 1961 study, the California Commission commented on jury trial in juvenile cases:

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8. As noted by the California Supreme Court in *In re Dennis M.* at 453, the California legislature has been fully responsive to *Gault* by adopting numerous amendments designed to implement *Gault*. See Calif. Stats. 1967, ch. 507, 1355, 1356.

> "The generally held view, shared by the commission and all of California's juvenile court judges, is that the jury system is incompatible with the philosophy of the juvenile court law." Report of the Governor's Special Study Commission on Juvenile Justice, Part II, at 19.

A survey of 25 judges in the largest California counties revealed all were opposed to such trials, their comments suggesting that jury trials would be in conflict with juvenile court philosophy and would destroy the protective purpose of the court. It was noted that the publicity attracted would go far to eliminate the confidentiality necessary for effectiveness. *Ibid.*

To a similar effect is the discussion by the President's Task Force on Juvenile Delinquency in 1967:

> "Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.
>
> "As has been observed, 'A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngsters a demonstrably better fact-finding process than trial before a judge.' The presence of a jury tends in a number of ways to contribute to an atmosphere of formality. In part, formality becomes itself an end insofar as it helps instill in jurors a sense of the seriousness and solemnity of their duties. Moreover, the presence of a jury affects the

whole process of dealing with evidence. Much of the reason for many restrictive rules of evidence, which typically give rise to narrow contentiousness over marginal issues, stems from the felt need to protect against a jury's susceptibility to prejudice and irrelevancies and its limited ability to distinguish between the more and less probative. And when a jury is the object of an attorney's persuasion, he naturally responds to what he believes will most effect it, with the usual result an emphasis on staging, effect and emotion rather than a more businesslike presentation.

"A further consideration arguing against a jury arises out of the typically loose and general statutory formulations of the behavior that may subject a youth to juvenile court jurisdiction, particularly insofar as the conduct includes acts other than those that would be criminal if engaged in by adults: *i.e.*, incorrigibility, need for care and supervision, truancy. Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms. If a jury were required, the appropriate standard of proof (beyond a reasonable doubt, preponderance of the evidence, and so forth) would become a more critical issue.

"As Mr. Justice Cardozo noted, it would not appear that a fair and enlightened system of justice is impossible without jury trials. 'This too might be lost, and justice still be done.' " The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime,* at 38 (1967).

The courts and commentators which have considered the issue have disagreed on its resolution, with the better reasoned opinions, in our view, taking the position that a jury

trial is not an essential part of due process in a juvenile proceeding.[9]

This issue was analyzed at length in *Commonwealth v. Johnson*, 211 Pa. Super. 62, 234 A.2d 9 (1967). The Pennsylvania appellate court reached the conclusion that jury trial is not a requirement of due process in juvenile proceedings.

> "In short, those who find in *Gault* the obliteration of any distinctions between the treatment accorded juveniles and adults are reaching a conclusion that is unwarranted. It is clear to us that the Supreme Court has properly attempted to strike a balance by injecting procedural orderliness into the juvenile court system. . . . It has not suggested that we discard the flexibility which has long been the hallmark of juvenile courts, but that we temper it with certain procedural safeguards." 234 A.2d at 15-16.

The court viewed *Gault* as an

> "invitation to formulate a court procedure which will combine the best aspects of juvenile and criminal court procedure into an amalgam which will offer the juvenile the best of both worlds." *Id.* at 16.

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9. *Compare Dryden v. Commonwealth*, 435 S.W.2d 457 (Ky. 1968); *Shone v. State*, 237 A.2d 412 (Maine 1968); *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508, 519 (1968) (minority opinion); *Estes v. Superior Court*, 438 P.2d 205 (Wash. 1968); *In re Agler*, 15 Ohio App.2d 240 (1968); and *Commonwealth v. Johnson*, 211 Pa. Super. 62, 234 A.2d 9 (1968) *with Nieves v. United States*, 280 F.Supp. 994 (S.D.N.Y. 1968); and *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968). See also, *In re Dennis M.*, 70 Cal.2d 444, 456 (1969) (by implication—jury trial not required). Commentators are similarly divided. *Compare Welch, op. cit. supra;* Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547, 559 (1957) *with Antieau, Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387, 399-400 (1961); Dorsen & Rezneck, *Gault and Juvenile Law*, 1 Family Law Q. No. 4; 1, 22-23 (1967). See generally, Annot. 100 A.L.R.2d 1241 (1968). The jurisdictions providing for jury trial in juvenile cases are listed in Petitioners' Brief at 29-30, n. 29.

The court reviewed the responsibilities of the juvenile court judge, finding, in essence, that he must be more than a trier of fact.

> "[H]e must, in a unique manner, establish a relationship that will permanently alter the behavior patterns of the child." *Id.* at 17.

The insertion of jury trials would sorely limit the juvenile court judge in carrying out his special tasks. *Ibid.*

> "[W]e find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques. The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children." *Ibid.*

Johnson was decided before this Court's decision in *Duncan v. Louisiana,* 391 U.S. 145 (1968), made the right to jury trial an element of due process applied to state criminal trials. The highest court of Kentucky considered the effect of *Duncan,* but nonetheless followed the Pennsylvania court in *Johnson.* In *Dryden v. Commonwealth,* 435 S.W.2d 457 (Ky. 1968), the court was unwilling to equate a juvenile proceeding with a criminal trial even though the basis might be conduct which would be a crime if committed by an adult. The court noted that if institutionalization may be the result, "it can make no sensible difference whether he is charged with having committed a criminal offense, of truancy, of habitual disobedience to his parents, or of being dependent, neglected, needy or abandoned." *Id.* at 461. The court continued:

> "A jury trial, with all the clash and clamor of the adversary system that necessarily goes with it, would certainly invest a juvenile proceeding with the appearance of a criminal trial, and create in the mind and memory of the child the same effect as if it were. In our opinion there is more to be lost than gained. Certainly we cannot regard a jury as a better, fairer, more accurate fact-finder than a competent and conscientious circuit judge." *Ibid.*

Petitioners cite the decisions of this Court in *Duncan v. Louisiana, supra, Bloom v. Illinois, supra,* and *Baldwin v. New York,* 399 U.S. 66 (1970) which hold generally that a defendant in a criminal trial or criminal contempt proceeding has the right to trial by jury if the crime is "serious," that is, may be punishable by incarceration for a period longer than six months. Petitioners argue that since they were subject to periods of institutionalization of from six to ten years and because the adjudicatory phase of juvenile proceedings under North Carolina law is materially indistinguishable from the ordinary criminal case, that due process as defined for juveniles in *Gault* and *Winship* includes the right to trial by jury.

We cannot agree that due process requires a jury trial in juvenile proceedings which may or may not involve "criminal" conduct; may or may not result in incarceration; and do not involve "crime in the ordinary sense; . . . a public wrong which is punishable by fine or imprisonment or both." *Bloom v. Illinois, supra,* at 201. We submit that petitioner's argument utterly fails to take into account the fact that a rigid application of *Duncan* and *Bloom* simply does not fit the realities of the juvenile court system. They argue, simply, that a jury trial must be provided whenever a juvenile is subject to incarceration, apparently for more than six

months. In juvenile cases, however, commitment for a potentially longer period may be order in cases where an an adult would not be entitled to a jury trial and in cases not involving crimes at all.

Petitioners avoid facing this obvious difficulty with their analysis merely by stating, "This case does not raise the question of the right to jury trial in juvenile proceedings which do not involve a charge of violation of state criminal laws." Brief for Petitioners at 11, n. 10. This case cannot avoid facing this problem, as long as potential commitment is argued to be the factor which underlies the right to trial by jury.

If the right to jury trial is based on potential commitment, then we must ask juries to find juveniles "guilty" of conduct which is not criminal and which is not subject to precise definition. As pointed out by the President's Task Force on Juvenile Delinquency as quoted, *supra*.

> "Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms."

In the statutory scheme established in California, and, as we read the statute, in North Carolina, when commitment is ordered, it is not determined by the conduct charged, but on the basis of factors developed in the dispositional hearing. The conduct serves only to give the court jurisdiction to proceed. This is the truly important distinction between adult and juvenile cases.[10]

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10. It was apparently the "tokenism" of this dispositional hearing that concerned this Court in *Gault:* "The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did—was it a prank of adolescence or a

"The fact of exposure to incarceration at all, a qualitative consideration, seems, in light of the fourteenth amendment's specific concern for preserving individual liberty, to be an appropriate basis for prescribing procedural safeguards aimed at ensuring the reliability of determinations that state intervention is warranted. The right to counsel, reliable evidence, standard of proof, cross-examination, and transcript of record all relate to reliability. Other procedural aspects of criminal prosecution, such as probable cause for apprehension, the right to bail, the right to trial by jury, the privilege against self-incrimination and exclusionary rules for evidence obtained by trespassory searches and seizures, should not be applied verbatim to juvenile proceedings without due consideration of qualitative differences in incarceration and other differences in juvenile law.

"Rather than holding that qualitative aspects of incarceration are 'of no constitutional consequence' and that other statutory 'rights and immunities' afforded the juvenile are 'in no way involved,' the cause of juvenile correction would be better served by a holding that made these 'differences' essential to the constitutionality of carefully tailored 'noncriminal' procedures, while insisting upon the realization of these differences *in fact* in individual cases through appropriate review by appeal and habeas corpus." Welch, *op. cit. supra*, at 35.

In *Winship*, this Court applied the criminal standard of proof to juvenile proceedings in which a "crime" was

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brutal act threatening serious consequences to himself or society unless corrected? Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility the boy could be disciplined and dealt with at home, despite his previous transgressions." (Footnotes omitted.) *Id.* at 28.

charged because, among other reasons, to do so would not disturb the policy that juvenile proceedings are confidential nor affect the informality, flexibility, or speed of the adjudicatory hearing. The same is obviously not true of trial by jury. Petitioners "simply do not understand how formality can be considered a vice. The rules of evidence which would be applied in any proceeding involving a jury represent our law's way of ensuring the most advantageous circumstances for dispassionate and objective determination of factual issues." Brief for Petitioners at 18. The appropriate rules of evidence are not at issue here; we doubt if even its most passionate defenders would seriously argue that a jury trial represents the best means that society could devise for "dispassionate and objective determination of factual issues." Far more than mere formality or the imposition of evidentiary rules is involved in a jury trial. In the fully adversary atmosphere necessarily generated by a jury trial, objectivity and dispassion are the exception, not the rule. Imposition of this atmosphere into juvenile proceedings would be, we submit, totally destructive of the beneficial aspects of the juvenile process, with no gain whatever in the reliability of the fact-finding process.

Finally, petitioners do not consider the problem of waiver which would result from the wholesale importation of criminal law procedures into the juvenile court system, particularly where the "right" in question is of highly debatable benefit or utility. The obvious problems of waiver by a juvenile have been recognized. *See, e.g., In re Gault, supra,* at 55; Comment, *The Juvenile Court Revolution in Washington,* 44 Wash. L. Rev. 421, 432-33 (1969). It has been stated that there are two issues involved: (1) What is the standard for an effective waiver; and (2) who has the authority to waive the juvenile's rights. *Ibid.*

If a juvenile court proceeding is a criminal trial, and the adult "protections" are to apply to the juvenile in full force, then he must have a jury trial as a constitutional right unless he has knowingly and intelligently waived it. *Cf., In re Gault, supra* at 42. There will obviously be some juveniles who will be incapable of waiving due to age or circumstances.

Yet, even in the sizable number of jurisdictions which provide by statute for a jury trial, the "right" is rarely exercised; most juveniles, or their parents or counsel, choose the informality, privacy, and expertise of a court proceeding. *See* Pausen, *op. cit. supra,* at 186; *Peyton v. Nord, supra,* at 726. However, if anyone but the juvenile is able to waive this right, then we are applying a different standard to juveniles, impermissible under the rationale that the differences in juvenile court proceedings do not justify deviation from the criminal law model. Thus, the unconscionable result of establishing the criminal jury trial as a constitutional right in a juvenile proceeding is to force the child incapable of waiving to participate in a jury trial which most legislatures have weighed and found wanting, and which those children capable of making an intelligent choice or their representatives nearly invariably reject.[11]

To answer that the problem does not exist because parent or counsel may waive the right is inevitably to recognize that the difference in proceedings concerning juveniles justifies different standards than those applied to adults.

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11. This should be contrasted with the situation in the adult criminal courts. "The laws of every state guarantee a right to jury trial in serious criminal cases; no state has dispensed with it; nor are there significant movements underway to do so." *Gault* at 154. "[T]he fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court." *Id.* at 158.

If this is so, then we fail to see why these same differences do not justify judicial deference to the legislative "waiver" made for all juveniles on the basis that their interests are not best served by a jury trial.

CONCLUSION

The problems of treating neglected, potentially delinquent and delinquent children cannot be adequately dealt with by forcing the proceedings into a criminal mold or by making the applicability of the criminal label depend on the potential disposition. Children and their parents are entitled to due process and fair proceedings whenever the state seeks to intervene in their relationship or to institutionalize the child. To recognize this, however, does not and should not compel the imposition of procedures developed to deal with the different problems of adults charged with crimes. Juvenile proceedings, when carefully developed as in California, are *sui generis* and represent considered legislative judgment as to the best way to deal in a rational and humane manner with the complex problems involved. We urge that this Court defer to the legislative judgment so that the system may evolve as necessary to deal with the problem.

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THOMAS C. LYNCH
Attorney General of the
State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

DERALD E. GRANBERG
Deputy Attorney General

GLORIA F. DEHART
Deputy Attorney General

Attorneys for the People of the State of California